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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

CLARA COOLEY,

Petitioner,

v.

HECTOR SANCHEZ, SR., RICARDO SANCHEZ, MARIA DEJESUS SANCHEZ, MATTEL, INC., AND OGILVY & MATHER,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The judgment below, which authorized a federal district court's interference and appellate review of pending state court probate proceedings under the All Writs Act presents the following questions:

1. May a federal district court under the guise of the All Writs Act, 28 U.S.C. §1651, divest a state court of pending jurisdiction when, with the knowledge of the federal court, all parites voluntarily begin state probate proceedings for ancillary relief?

2. After the parties voluntarily submitted to the jurisdiction of a state probate court for appointment of a guardian, may a federal district court remove the guardian appointed in the state court in an *ex parte* proceeding to facilitate the approval of a settlement that the state guardian found inadequate?

3. May a federal court disregard statutes governing the removal of actions from state court under a priority notion when applying the All Writs Act, 28 U.S.C. §1651?

PARTIES TO THE PROCEEDING

The caption of this Petition for Writ of Certiorari contains the names of parties to the proceeding in the United States Court of Appeals for the Fifth Circuit.

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OPINIONS BELOW

The ruling of the United States District Court for the Western District of Louisiana authorizing removal (Appendix, *infra*, 9a) was entered on June 21, 1991. The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix, *infra*, 18a) was entered on May 6, 1992. The order of the Galveston County Probate Court denying approval of the proposed settlement (Appendix, *infra*, 1a) was entered on February 5, 1991.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 6, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28, §1441(a) provides that:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Title 28, §1446(a) provides that:

> A defendant or defendant desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

Title 28, §1446(d) provides that:

> Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

Title 28, §1447(c) provides that:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Title 28, §1651(a) (the "All Writs Act") provides that:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or

> appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Texas Probate Code §3(bb) provides that:

> "Probate matter," "Probate proceedings," "Proceeding in probate," and "Proceedings for probate" are synonymous and include a matter or proceeding relating to guardianship, as well as a matter or proceeding relating to the estate of a decedent, and proceedings regarding incompetents.

Texas Probate Code §234(a) provides in relevant part that:

> The personal representative of the estate of any person may, upon application and order authorizing same, renew or extend any obligation owing by or to such estate. When a personal representative deems it for the interest of the estate, he may, upon written application to the court, and by order granting authority:
>
> . . .
>
> (4) Make compromises or settlements in relation to property or claims in dispute or litigation[.]

Texas Probate Code §222(b) provides that in relevant part:

> The court may remove a personal representative on its own motion, or on the complaint of any interested person, after the personal representative has been cited by personal service to answer at a time and place fixed in the notice, when:
>
> (1) Sufficient grounds appear to support belief that he has misapplied, embezzled, or

removed from the state, or that he is about to misapply, embezzle, or remove from the state, all or any part of the property committed to his care; or

(2) He fails to return any account which is required by law to be made; or

(3) He fails to obey any proper order of the court having jurisdiction with respect to the performance of his duties; or

(4) He is proved to have been guilty of gross misconduct, or mismanagement in the performance of his duties; or

(5) He becomes an incompetent, or is sentenced to the penitentiary, or from any other cause becomes incapable of properly performing the duties of his trust; or

(6) As executor or administrator, he fails to make a final settlement within three years after the grant of letters, unless the time be extended by the court upon the showing of sufficient cause supported by oath; or

(7) As guardian of the person, he cruelly treats the ward, or neglects to educate or maintain the ward as liberally as the means of such ward and the condition of his estate permit.

STATEMENT OF THE CASE

At issue in this case is the authority of federal district courts to interfere with pending state court probate proceedings. The Federal District Court below reversed the actions of a state court in probate matters. Apart from its

intrinsic interest as a matter of judicial federalism, this issue is of important practical significance in all cases in which a state court decision regarding a probate matter does not comport with the opinion of a federal court on the same matter. Petitioner asserts that principles of comity require full faith and credit be given to state probate determinations.

The parties to this Petition for Writ of Certiorari are Clara Cooley ("Cooley"), Petitioner herein in her capacity as guardian of the minor child Ricardo Sanchez ("Ricky"); Ricky Sanchez; Hector Sanchez, Sr., and Maria de Jesus Sanchez ("Mr. and Mrs. Sanchez"), plaintiffs in the tort action and Respondents herein; and, Mattel, Inc. ("Mattel") and Ogilvy & Mather ("Ogilvy"), defendants in the tort action and Respondents herein.

Other persons or entities that are mentioned herein are Judge Donald Walter ("Judge Walter"), the Presiding Judge of the Federal District Court for the Western District of Louisiana ("Federal District Court"); Judge Jerome Jones ("Judge Jones"), Presiding Judge of the Texas Probate Court ("State Probate Court"); and, Robert V. Shattuck ("Shattuck"), the attorney ad litem appointed by Judge Jones.

In December 1987, when Ricky Sanchez was eleven years old, he viewed a "Hot Wheels" television commercial showing a bucket of fire poured over a "Hot Wheels" car and the car emerging on its own power unscathed. Ricky tried to emulate the commercial by placing a lighted match inside his toy car and then taking an empty gasoline can and shaking it over the car. The match ignited fumes from the can and caught Ricky's clothing

on fire. As a result, Ricky was horribly burned and disfigured. Ricky was flown to the Shriners' Burn Center in Galveston, Texas, where he continues to receive treatment. In 1988, Maria de Jesus Sanchez and Ricky Sanchez originally filed suit against Mattel in Louisiana state court for damages sustained by Ricky as a result of viewing the commercial. Mattel sought removal of the case to federal district court and the case was eventually assigned to the Federal District Court for the Western District of Louisiana. Later, the plaintiffs added Ogilvy & Mather, the advertising agency who created the commercial, to the lawsuit.

After the Federal District Court denied defendants' motions for summary judgment, on or about May 1, 1990, attorneys for the plaintiffs and defendants reached a proposed settlement which, pursuant to Louisiana law, required the plaintiffs to seek probate court approval of the minor's settlement. Defendants, Mattel and Ogilvy, through Texas counsel voluntarily filed suit in the Probate and County Court of Galveston County, Texas seeking appointment of a guardian over Ricky and his estate and approval of the proposed settlement. In the Guardianship Application, Mrs. Sanchez, Ricky's mother and one of the plaintiffs, represented to the Texas State Probate Court that venue was proper in Galveston County and that the State Court had jurisdiction over the minor child, Ricky Sanchez, and his estate. The Guardianship Application also stated that any action or claim affecting the interest of the minor could only be settled with the approval of the appropriate court having jurisdiction over the interests of the minor. Judge Jones first appointed Mrs. Sanchez as Ricky's guardian. However, when it

became clear that Mrs. Sanchez could not post the $50,000 bond required by Texas law, the State Probate Court appointed Clara Cooley as Ricky's guardian on July 3, 1990. After a hearing, the State Probate Court determined that the settlement did not adequately compensate the minor for his severe injuries. Accordingly, the State Probate Court entered an Order Denying Application to Settle Controversy and Enjoining the Parties from Settling Lawsuit Without Court Authority. An appeal of the State Probate Court's denial was perfected to the Court of Appeals in Houston and the injunction was dissolved by the State Probate Court.

While the appeal was pending, plaintiffs and defendants filed in the Federal District Court a Joint Petition, Third-Party Demand, and Petition to Remove Cloud Upon Title to Personal Property Located In This District against Robert Shattuck, the attorney ad litem appointed by the State Probate Court. That petition alleged that Cooley and Shattuck had not sought the State Probate Court's approval of the settlement to which Cooley and Shattuck objected.

Having decided that the Texas Probate Court would not rubber-stamp the proposed settlement, the attorneys for the plaintiffs and defendants decided to do an end run around the State Probate Court and have the Federal District Court assume responsibility for approving the case's settlement, even though the parties had previously represented to the State Probate Court that it had sole jurisdiction to approve the settlement.

The plaintiffs and defendants then moved the Federal District Court, *ex parte,* to remove the probate proceedings from the State Probate Court under the purported authority of 28 U.S.C. §1651, the All Writs Act. Despite its lack of probate jurisdiction, the Federal District Court ordered removal by Memorandum Ruling and Order dated June 21, 1991. Then, exercising probate jurisdiction, the Federal District Court removed Cooley as guardian, appointed Mrs. Sanchez as guardian, and approved the settlement previously rejected by the State Probate Court. After a motion to remand was filed, judgment was entered incorporating Cooley's removal, Mrs. Sanchez's appointment, and the proposed settlement. Cooley appealed the Federal District Court's actions and judgment to the United States Court of Appeals for the Fifth Circuit since the Federal District Court created jurisdiction over probate proceedings under the guise of the All Writs Act.

REASONS FOR GRANTING THE PETITION

The judgment of the appellate court below sanctions an unprecedented intrusion by a federal district court into state court probate proceedings and represents the opening of a significant breach in the wall of judicial doctrines erected as a barrier to such intrusions. Despite that barrier, the Fifth Circuit ruled that a federal district court could step into the shoes of a state probate court, remove a guardian properly appointed by the state court without regard to state probate laws assuring due process, and approve a proposed settlement that the state-appointed guardian and state court had found wholly

inadequate. Further, the Fifth Circuit erred in upholding the removal of the state probate proceedings to federal district court without appropriate jurisdiction over the matter and without compliance with federal removal statutes.

The Fifth Circuit's ruling most assuredly warrants review by this Court. It invites federal courts to second-guess state probate court decisions in every case in which the federal court would desire a different result or would exercise its discretion differently from the state probate court. Upholding this unwarranted assertion of power by the federal district court is tantamount to granting federal courts de facto jurisdiction in probate matters, that under the Judiciary Act of 1789, 1 Stat. 73, is the exclusive province of the state courts.

A. THE FIFTH CIRCUIT ERRED IN ALLOWING AN IMPROPER CREATION OF JURISDICTION UNDER THE ALL WRITS ACT BY THE FEDERAL DISTRICT COURT OVER A STATE COURT PROBATE MATTER.

The Fifth Circuit erred in upholding the removal of the probate proceedings from the State Probate Court since (1) federal district courts have no jurisdiction to take control of pending probate matters, (2) federal district courts cannot remove cases which are on appeal in state court systems, (3) the parties seeking relief had sufficient remedies to effect their relief apart from removal, and (4) the parties totally failed to properly remove the case in accordance with the federal removal statutes. Once it becomes apparent that a federal court

lacks subject matter jurisdiction over a removed matter, it must remand the case to the state court from which the matter was removed for further proceedings. 28 U.S.C. §1447(c).

Under Texas law, the appointment of a guardian is a probate proceeding. TEX. PROB. CODE ANN. §3(bb). The Texas Probate Code statutorily prescribes the powers, duties, and obligations of the ward's appointed guardian. Those powers include the right to compromise and settle any claims or disputes of the estate in litigation. However, such settlement powers are granted only upon authorization of the settlement by the court having jurisdiction over the guardianship. TEX. PROB. CODE ANN. §234(a)(4). A personal representative of an estate cannot compromise disputed matters without the probate court's order authorizing the action. *Scott v. Taylor*, 294 S.W. 227 (Tex. Civ. App. – Amarillo 1927, no writ). Further, any compromise of litigation without a court order authorizing the settlement is voidable by the probate court. *Catlett v. Catlett*, 630 S.W.2d 478 (Tex. Civ. App. – Fort Worth 1982, writ ref'd n.r.e.). In the case at bar, the Texas Probate Code requires approval of the proposed settlement between the plaintiffs and defendants by the Galveston County Probate Court. The parties were unable to obtain that approval since the state-appointed guardian and the State Probate Court, after a hearing which indicated that Ricky and his family would lose Social Security benefits if the settlement was approved, decided that the settlement was inadequate to provide for Ricky Sanchez's substantial medical needs. In order to bypass the State Probate Court and the state-appointed

guardian and render their opinions ineffective, the parties sought approval of the settlement from the federal district court by removing the state-appointed guardian.

A long line of cases from this Honorable Court and lower courts has held that federal courts do not have jurisdiction over state probate proceedings and cannot seize or control the property in a state probate court's possession. *Markham v. Allen,* 326 U.S. 490 (1946); *Waterman v. Canal-Louisiana Bank & Trust Co.,* 215 U.S. 33 (1909); *Application of Blakeman,* 512 F.Supp. 325 (E.D.N.Y. 1981). Federal courts have no general probate powers. *Warner v. First National Bank of Minneapolis,* 236 F.2d 853 (8th Cir. 1956), *cert. denied,* 352 U.S. 927 (1956). Specifically, federal jurisdiction does not extend to probate matters because such matters are statutory and are not within an equity court's general jurisdiction. *Looney v. Capital National Bank,* 235 F.2d 436 (5th Cir. 1956), *cert. denied,* 352 U.S. 925 (1956). A federal district court cannot interfere with probate proceedings or assume general jurisdiction over probate matters or control property within the state court's custody. *Republic of Iraq v. First National City Bank,* 353 F.2d 47 (2d Cir. 1965), *cert. denied,* 382 U.S. 1027 (1966).

In the case at bar, the Federal District Court removed the probate proceedings from the State Probate Court purportedly pursuant to the All Writs Act, 28 U.S.C. § 1651, for the precise purpose to give it the power to substitute its judgment for that of the State Probate Court. Clearly, the Federal District Court's actions interfered with the State Probate Court's general jurisdiction to control property within the state court's jurisdiction. Such action was an impermissible exercise of federal power over probate proceedings and was clear error on

the part of the Federal District Court. The Fifth Circuit Court of Appeals erred in permitting this unprecedented assertion of power by the Federal District Court.

While the All Writs Act grants a federal court broad powers to preserve its jurisdiction, the Act does not confer upon a court jurisdiction that it does not already possess. *Commercial Security Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352 (10th Cir. 1972); *Brittingham v. U.S.C.I.R.*, 451 F.2d 315 (5th Cir. 1971). Neither does the All Writs Act provide a substitute or alternative ground for jurisdiction. Rather, the court must have original jurisdiction over the relief sought before the All Writs Act may be employed. *Morrow v. District of Columbia*, 417 F.2d 728 (D.C. Cir. 1969); *Commercial Security Bank, supra.* The All Writs Act only gives the federal courts power to issue those writs that are both (1), "necessary or appropriate in aid of their respective jurisdictions" and (2) "agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Because federal courts have no power or jurisdiction to control probate proceedings, the use of the All Writs Act in this case is clearly not agreeable to the usages and principles of law. Thus, the actions of the Federal District Court below do not meet both parts of the test under 28 U.S.C. § 1651(a) for the *ex parte* removal of probate proceedings from a state court.

Further, the All Writs Act does not grant the federal courts the authority to usurp a state official's discretion. *United States ex rel. Chapman v. Supreme Court of Pennsylvania*, 151 F.Supp. 681 (W.D.Pa. 1957) (holding that a federal district court judge cannot issue a writ of mandamus against state officers who are exercising their discretionary duties). Specifically, federal courts have no general

power to direct a state court or its officers to perform their duties in a specific manner. *Russell v. Knight*, 488 F.2d 96 (5th Cir. 1973) (proscribing the federal court's use of a writ of mandamus to command a state court judge to allow petitioner to exercise his right to appeal).

Additionally, a federal district court has no jurisdiction to remove a case in which an appeal is pending. Cases may permissibly be removed only from the court of original jurisdiction, not from an appellate court. *Lowe v. Williams*, 94 U.S. 650 (1876); *Stevenson v. Williams*, 86 U.S. 572 (1873); *Katz v. Herschel Manufacturing Co.*, 150 F. 684 (C.C. Neb. 1906). In the case at bar, the denial of the application to settle controversy was on appeal to the Texas Court of Appeals at the time the probate proceedings were removed from the State Probate Court by the Federal District Court. Since the same settlement was at issue in the appellate court, the Federal District Court had no jurisdiction to remove the case.

The All Writs Act may be employed only in extraordinary circumstances, which clearly did not exist when the Federal District Court seized the settlement authority from the State Probate Court. The court may not employ the All Writs Act unless the party seeking the relief has shown he has no other adequate remedy. *In re Montes*, 677 F.2d 415 (5th Cir. 1982). In the case at bar, the plaintiffs and defendants could not, nor did they attempt to demonstrate that there was no adequate remedy apart from the invocation of the All Writs Act. It is clear that an adequate remedy in the form of a trial on the merits existed.

If a court may effect a full and complete resolution of the issues before it without resorting to extraordinary measures under the All Writs Act, then the measures under the All Writs Act cannot be employed. *ITT Community Development Corp. v. Barton*, 569 F.2d 1351 (5th Cir. 1978). Since the State Probate Court would have been bound by a judgment of the Federal District Court following trial on the merits, as it clearly noted in its Order Denying Application to Settle Controversy, the federal court could have effected a full and complete resolution of the issues simply by proceeding to trial. It is absolutely clear that the attorneys for plaintiffs and defendants merely sought impermissibly to have their opinion regarding the propriety of the settlement substituted by the Federal District Court for the considered judgment of Judge Jones and the state-appointed guardian. This was an impermissible grasp of power from the State Probate Court. While a federal court has practical incentives to move its docket, such incentives do not authorize the trampling of rights exclusively granted to the sovereign states.

Moreover, the writs authorized by the All Writs Act may not be employed to substitute for trial or appeal. *Bankers Life and Casualty Co. v. Holland*, 346 U.S. 379 (1953). If an action may be taken without the writ, then the writ may not issue. *Id.* at 383. Since a final judgment could have been obtained by trying the case at bar without resorting to the extraordinary writs authorized under the All Writs Act, the Federal District Court erred in using said act to circumvent the State Probate Court's ruling on a matter clearly within the state court's jurisdiction. Even the Fifth Circuit itself has recognized that the

All Writs Act may not be employed by a party who has other adequate remedies, even if the Act would more expeditiously or efficiently resolve the issues. In *ITT*, that Circuit, quoting this Court, noted that "[t]he fact that a party may be better able to effectuate its rights or duties if a writ is issued never has been, and under the language of the statute cannot be, a sufficient basis for issuance of the writ." *ITT*, at 1360. The litigants at bar merely sought and obtained from the Federal District Court a more simple way to effectuate a resolution of this case than the law allows. The failure of the Fifth Circuit to reverse the overreaching action of the Federal District Court is an error of such importance as to require review and correction by this Honorable Court.

The Federal District Court cited the case of *Yonkers Racing Corporation v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988) *cert. denied*, 489 U.S. 1077 (1989), for the proposition that its actions were proper in the case at bar. However, *Yonkers* is clearly distinguishable from the case before this Court. In *Yonkers*, the federal district court had previously mandated the City of Yonkers to provide public housing sites in non-minority locations. The City of Yonkers initiated condemnation proceedings in those non-minority locations to obtain the land for public housing as required by the federal court ruling. The affected property owners sued in state court to enjoin the city from condemning their property and the federal district court ordered the City of Yonkers to remove those claims to its court. Clearly, the federal district court was merely seeking to enforce its jurisdiction in agreement with the usages and principles of law in order to prevent the homeowners from frustrating the implementation of the

federal district court's order. In the case at bar, there was no federal district court order which was frustrated by the State Probate Court's action. The plaintiffs and defendants below, for whatever reason, did not request the Federal District Court to approve the settlement until after the Texas Probate Court turned them down.

In the case at bar, there was no mandate impeding the parties from fully and finally resolving the issues. The parties could have obtained a full and final resolution of this matter by trying this case before a jury or by negotiating an increased settlement amount in accord with the severity of Ricky's injuries and the negligence of the defendants. Because the All Writs Act was not necessary to effect the Federal District Court's jurisdiction in this matter, its use was improper and the removal of the probate proceeding was erroneous.

B. THE FIFTH CIRCUIT'S RULING AUTHORIZES REMOVAL OF A STATE COURT ACTION TO A FEDERAL COURT WITHOUT COMPLIANCE WITH FEDERAL REMOVAL STATUTES, THUS DENYING PETITIONER OF DUE PROCESS OF LAW.

Additionally, the removing parties failed to comply with the federal statues governing removal. 28 U.S.C. § 1441 provides that: " . . . any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants . . . " 28 U.S.C. § 1446 then prescribes the procedures to be followed in removing such actions. Federal courts should strictly construe the removal statutes against extending federal power and in

favor of remanding a removed case to state courts. *York v. Horizon Federal Saving and Loan Association,* 712 F.Supp. 85 (E.D.La. 1989); *McCurtain County Production Corp. v. Cowett,* 482 F.Supp. 809 (E.D.Okla. 1978); *Mielke v. Allstate Insurance Co.,* 472 F.Supp. 851 (E.D.Mich. 1979). Removal of the probate proceeding into the Federal District Court was improper and remand mandated by the relevant statutes because: (1) this Federal District Court does not have jurisdiction over probate matter, as shown above; (2) there was no defendant in the probate proceeding with standing to remove this matter; (3) the case at bar was before the Texas appellate court and was therefore not subject to removal; and, (4) the prescribed procedures regarding removal were not followed.

It is unquestionable that the right to remove a case from state to federal court is a defendant's right and not a plaintiff's right. 28 U.S.C. § 1441(a). The procedural rules for removal provide the actions which the defendant must take to remove a state civil action to federal court. 28 U.S.C. § 1446. Only a defendant may confer removal jurisdiction upon the federal court. Wright, Miller & Cooper, *Federal Practice and Procedure 2d,* § 3721; *Chicago Rock Island & Pacify Railroad v. Stude,* 346 U.S. 574 (1954); *Ballards Service Center v. Transue,* 865 F.2d 447 (1st Cir. 1989). A plaintiff cannot remove actions from a state court to the federal court system. *Ford Motor Credit Co. v. Liles,* 399 F.Supp. 1282 (W.D.Okla. 1975). In the probate proceeding, Mrs. Sanchez, with the assistance of the defendants, sought approval of the settlement between the plaintiffs and defendants on Ricky's behalf. Cooley was substituted into that application when Cooley succeeded Mrs. Sanchez as Ricky's guardian. At no time were there

any defendants in the probate proceeding. Since there was no defendant in the state probate proceeding, there was no party with standing to remove the case to the Federal District Court as required by the statutes. Accordingly, removal was improper, the Federal District Court should have remanded the probate proceeding to the State Probate Court, and the Fifth Circuit erred in upholding this radical use of the federal removal statutes to rob jurisdiction from the state court.

Moreover, a federal district court has no jurisdiction to remove a case which is currently on appeal, as a case may be removed only from the court of original jurisdiction and not from an appellate court. *Lowe v. Williams,* 94 U.S. 650 (1876); *Stevenson v. Williams,* 86 U.S. 572 (1973); *Katz v. Herschel Manufacturing Co.,* 150 F.2d 684 (C.C.Neb. 1906). Since the state probate proceeding had been completed and an appeal was perfected, the case at bar was before the Texas appellate court system prior to its improper removal to federal court. That appeal, under Case No. 01-91-00222-CV, was already in the First Supreme Judicial Court of Appeals for the State of Texas, when the removal order was issued. Accordingly, the Federal District Court had no jurisdiction to take the case from the Texas Court of Appeals.

The federal removal statutes also provide the procedures to be followed by the removing defendant. 28 U.S.C. § 1446. The removal statutes must be strictly construed and the procedures precisely followed. *Zbranek v. Hofheinz,* 727 F.Supp. 324 (E.D. Tex. 1989); *York v. Horizon Federal Savings and Loan Assoc.,* 712 F.Supp. 85 (E.D. La. 1989); *McCurtain County Production Corp. v. Cowett,* 482 F.Supp. 809 (E.D. Okla. 1978); *Jennings Clothiers of Ft.*

Dodge, Inc. v. U.S. Fidelity & Guaranty Co., 496 F.Supp. 1254 (N.D. Iowa 1980); *Winters Government Securities Corp. v. Nafi Employees Credit Union*, 449 F.Supp. 239 (S.D. Fla. 1978). The procedural requirements for removal were not met in the case at bar as the removal was not filed in the proper district or division, but more importantly, neither the State Probate Court nor Cooley were notified of the removal's filing.

A notice of removal must be filed in the district and division within which such state court action is pending. 28 U.S.C. § 1446 (a). By statute, only the federal court for the district and division within which the state court action is pending has jurisdiction. 28 U.S.C. § 1446. Accordingly, even if this action was properly removable, which Cooley argues it was not, the only federal district court having jurisdiction over such matter would be the Federal District Court for the Southern District of Texas Galveston Division. The provisions of § 1446(a) are mandatory. The proper procedural method for removal of a case to Louisiana would be a removal to the Federal District Court in Texas and a Motion to Transfer Venue or Consolidation. At each of these procedural steps, Cooley would have been entitled under the due process clause to notice and an opportunity to be heard.

Due process was denied Cooley in the instant case as she was not notified of the filing of the removal and not given an opportunity to respond. Federal law requires that the removing defendant give notice of the filing of the petition for removal to the state court and all adverse parties. 28 U.S.C. § 1446(d). Failure to comply with the prescribed removal procedures constitutes grounds for remand. *Shadley v. Miller*, 733 F.Supp. 54 (E.D. Mich.

1990). Where the removal procedures have not been followed, remand is available as the removal has been improvidently granted. *Albonetti v. GAF Corporation – Chemical Group*, 520 F.Supp. 825 (S.D. Tex. 1981); *Intercoastal Refining Co. Inc. v. Jalil*, 487 F.Supp. 606 (S.D. Tex. 1980). The Federal District Court in the case at bar cited *Yonkers Racing Corporation v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988) *cert. denied*, 489 U.S. 1077 (1989), for the proposition that its action in this case was proper. However, there is no indication in either the facts or the opinion of the Second Circuit in the *City of Yonkers* case that indicates that the All Writs Act takes priority over the procedural requirements of federal removal statutes. Accordingly, the reliance upon *City of Yonkers* by the Federal District Court was misplaced. The parties who improperly removed the state probate proceeding to the Federal District Court failed to comply with the mandates of federal law for removal. Accordingly, the actions of the Federal District Court were beyond the scope of permissible jurisprudence, and the Fifth Circuit erred in upholding the Federal District Court's usurpation of the State Probate Court's jurisdiction.

Further, the purported removal of Cooley as guardian by the Federal District Court failed to comply with Texas Probate Code provisions governing the removal of court appointed guardians. The federal court order purportedly removing Cooley as the guardian of Ricky Sanchez is insufficient under TEX. PROB. CODE ANN. § 222(c) as it fails to state the reason or reasons for Cooley's removal. TEX. PROB. CODE ANN. § 222 prescribes the procedures which must be followed in order to remove a personal

representative, such as a guardian, from his or her position. Except under limited circumstances specifically detailed in the statute and which are clearly not present in the case at bar, the guardian must be personally served by citation to answer at a time and place fixed in the notice. TEX. PROB. CODE ANN. § 222(b). Cooley was not personally served with citation or ordered to answer. Nowhere in the record is there a return of citation apprising Cooley that a show cause hearing was to be held on a petition for her removal. The only notice which the Plaintiffs and Defendants could point to is the Order setting a hearing on Maria Sanchez's petition for appointment. Since that was not even mailed to Cooley, much less served as required by Texas law, the Federal District Court failed to obtain jurisdiction to consider removing Cooley as guardian. As such, the Federal District Court erred in removing Cooley as guardian.

CONCLUSION

In its haste to provide immediate relief to its docket and the parties contesting before it, the Federal District Court has improperly usurped probate jurisdiction from the State Probate Court under the auspices of the All Writs Act. Such an unprecedented assumption of power was condoned by the Fifth Circuit by its refusal to order remand of the state probate matters to the court of proper jurisdiction. At the heart of the Fifth Circuit's opinion was the notion that it is distasteful that there exist fact situations under which a state court could influence the docket of a federal court. However, such a result was clearly intended by the Judiciary Act of 1789, 1 Stat. 73.

The All Writs Act cannot be used as a sword to cut through the fabric of judicial doctrines which have existed in this country for over two-hundred years. The result of the decision of the Fifth Circuit is a de facto grant of probate jurisdiction to all federal district courts, further blurring the boundaries of federalism. For these reasons, this Honorable Supreme Court should grant this Petition for Writ of Certiorari.

DATED: August 3, 1992

Respectfully submitted,

JOHN S. MCELDOWNEY
ANDREW J. MYTELKA
(Counsel of Record)
GREER, HERZ & ADAMS, L.L.P.
One Moody Plaza, 14th Floor
Galveston, Texas 77550
(409) 765-5525

Attorneys for Petitioner,
Clara Cooley

APPENDIX

No. 53,586

GUARDIANSHIP OF RICARDO SANCHEZ, A MINOR

IN THE PROBATE COURT OF GALVESTON COUNTY, TEXAS

ORDER DENYING APPLICATION TO SETTLE CONTROVERSY AND ENJOINING PARTIES FROM SETTLING LAWSUIT WITHOUT COURT AUTHORITY

(Filed Feb. 5, 1991)

On this the 5th day of February 1991, came on to be considered the Application to Settle Controversy filed herein, and in connection therewith the Court makes the following findings of fact and conclusions of law:

1. On June 18, 1990, Maria deJesus Sanchez, the mother of the minor ward, Ricardo Sanchez, filed an application for letters of guardianship in this court alleging that she was seeking guardianship of the estate of the proposed ward; that the ward and herself were residents of Galveston County; that the proposed ward owns an interest in a lawsuit pending in the District Court of the United States of the Western District of Louisiana being Cause No. CV88-1508, styled Hector Sanchez, Sr. et al. v. Mattel, Inc.; that per the State of Louisiana Statute, Article 4271, all action on claims affecting the interests of minors can only be settled with approval of the appropriate court having jurisdiction of the minor; that this court has venue of the proceedings.

2. That said petition for guardianship was signed by the lawfirm of McLeod, Alexander, Powel & Apffel, P.C., with Fredrick J. Bradford and Anthony P. Brown listed as

attorneys of record; that the following lawyers were listed "of Counsel":

Mr. C. Edgar Cloutier
Christovich & Kearney
Suite 2300 Pan American Life Center
601 Poydras St.
New Orleans, La. 70130-6078

Mr. William Nolen
Jones, Tete, Nolen, Hanchey, Swift & Spears
P. O. Box 910
Lake Charles, La. 70602

Ms. Jennifer Jones Bercier
Jones, Jones & Alexander
P. O. Drawer M
Cameron, La. 70631

3. That although McLeod, Alexander, Powel & Apffel, Inc., filed the petition, they have agreed that they, at all times, also represented the defendants in the civil lawsuit described above.

4. On June 18, 1990, this court entered an order finding that this court has venue and appointed a guardian of the estate of the minor ward. On the 3rd day of July, 1990, the original guardian having been unable to post bond and with her consent and the consent of all parties, Clara Cooley, a Spanish speaking caseworker with Galveston County Child Welfare Unit, was appointed successor guardian of the estate of the minor ward.

5. The order of June 18, 1990 and order of July 3, 1990, were not appealed and have become final by operation of law.

6. All parties who invoked the venue and jurisdiction of this court, including the mother of the proposed ward, the defendants and their attorneys, the attorneys for the minor ward, and her mother, Mrs. Jennifer Jones Bercier, are bound by the final orders described above and are equitably estopped to deny the venue and jurisdiction of the court and the legal effect of said orders and from denying the authority of said guardian to act under Texas Law.

7. On June 18, 1990, an Application to Settle Controversy was filed by Anthony Brown, purporting to act as attorney for the proposed guardian, Maria deJesus Sanchez, but admittedly acting as attorney for the defendants in the above styled personal injury case described in Finding No. 1 above. The following defendants' counsel and attorney for the mother and minor ward, were listed as "of Counsel":

Mr. C. Edgar Cloutier
Christovich & Kearney
Suite 2300 Pan American Life Center
601 Poydras St.
New Orleans, La. 70130-6078

Mr. William Nolen
Jones, Tete, Nolen, Hanchey, Swift & Spears
P. O. Box 910
Lake Charles, La. 70602

Ms. Jennifer Jones Bercier
Jones, Jones & Alexander
P. O. Drawer M
Cameron, La. 70631

8. The Defendants, Mattel, Inc., and Ogilvy & Mather, Inc., by and through their attorneys as listed

above, and the mother, Maria deJesus Sanchez and her attorney, Jennifer Jones Bercier, joined in the Application to Settle Controversy and are equitably estopped to deny the venue of the court and its authority to approve or disapprove any proposed settlement.

9. Following the filing of the application one or more recorded hearings were held in which all parties participated, including the Guardian, Clara Cooley, the duly appointed attorney ad litem, Robert Shattuck, the mother, Maria deJesus Sanchez, the attorney, Jennifer Jones Bercier, Defendants' attorney, Anthony Brown; said hearings being thorough and complete to the extent that, in addition to oral testimony, formal stipulation as to admissibility and use of evidence, including video testimony, was entered and signed by Mr. Shattuck, Mr. Brown and Ms. Bercier. No objection was made as to forum, pleadings or venue at such hearings.

10. Texas Probate Code Sec. 233 reads as follows:

> Every personal representative of an estate shall use ordinary diligence to collect all claims and debts due the estate and to recover possession of all property of the estate to which its owners have claim or title, provided there is a reasonable prospect of collecting such claims or of recovering such property. If he wilfully neglects to use such diligence, he and the sureties on his bond shall be liable, at the suit of any person interested in the amount of such claims or the value of such property as has been lost be such neglect. Such representatives may enter into contract to convey, or may convey, a contingent interest in any property sought to be recovered, not exceeding one-third thereof, for services of

attorneys and incidental expenses, subject only to approval of the court in which the estate is being administered.

11. Texas Probate Code, Sec. 234 reads as follows:

(a) Powers to be Exercised Under Order of the Court. The personal representative of the estate of any person may upon application and order authorizing same, renew or extend any obligation owing by or to such estate. When a personal representative deems it for the interest of the estate, he may upon written application to the court, and by order granting authority:

(4) Make compromises or settlements in relation to property or claims in dispute or litigation;

12. The court finds, as a matter of law, that the cause of action belonging to the minor, and being litigated in CV88-1508 in the U. S. District Court for the Western District Court of Louisiana, cannot be compromised or settled without the written consent of the Guardian, Clara Cooley, who must first obtain this court's authority to make such settlement or compromise. In making this finding this court does not dispute the jurisdiction of the U. S. District Court to try the personal injury to a final judgment, after trial to a jury.

13. After hearing evidence in regard to the Application to Settle Controversy, the court finds that the amount proposed to be paid by the defendants to the minor ward in full settlement of his claim is inadequate to compensate him and his estate for the horrible injuries sustained by him.

14. The court takes judicial knowledge that the defendants, Mattel, Inc., and Ogilvy-Mathes [sic], and purportedly joined by the minor ward's mother, have filed an action in the U.S. District Court for the Western District of Louisiana, CV-1508, entitled "Joint Petitioners, Third Party Demand and Petition to Remove Cloud upon title to personal property located in this District". The court finds that the above styled action is nothing more than a transparent attempt to divest this court of jurisdiction and venue; a jurisdiction and venue which the petitioners themselves invoked. The court further finds, but defers to the U.S. District Court's ruling, that the petitioners are equitably estopped to deny this court's jurisdiction and venue.

The court further believes, but defers to the U.S. District Court ruling, that the petition filed is an anticapatory collateral attack upon this court's ruling is set out in Finding No. 13 that the proposed settlement is inadequate. The court further finds that the respondents in the above styled suit, Clara Cooley, Guardian, and Robert Shattuck, attorney ad litem, are creatures of the court, having no personal or individual interest in the subject matter of the suit and to make them a party to the suit is simply a clumsy attempt to harass and coerce them into agreeing to a settlement that this court has already found to be inadequate.

15. The court further finds that the defendants, Mattel, Inc., and Ogilvy & Mather, Inc., and Jennifer Jones Bercier, purportedly representing the mother of the minor ward, after invoking the jurisdiction and venue of this court, have persisted and will continue to persist in trying to settle this personal injury case belonging to the

estate of the minor ward without obtaining approval of this court, unless restrained by this court; it is therefore ordered that Maria deJesus Sanchez and the attorney Jennifer Jones Bercier be and are hereby temporarily enjoined from entering into any settlement or compromises; signing any settlement or compromise documents, petitioning any court, other than this court, to approve any settlement or compromise of the personal injury cause of action described above without receiving prior approval of this court.

It is further ordered that the defendants, Mattel, Inc., and Ogilvy & Mather, Inc., and their agents and attorneys including but not limited to the following law firms and their members, associates, attorneys or agents:

Mr. C. Edgar Cloutier
Christovich & Kearney
Suite 2300 Pan American Life Center
601 Poydras St.
New Orleans, La. 70130-6078

Mr. William Nolen
Jones, tete [sic], Nolen, Hanchey, Swift & Spears
P. O. Box 910
New Orleans, La. 70602

McLeod, Alexander, Powel & Apffel
P.O. Box 629
Galveston, Tx. 77553

be temporarily enjoined from entering into compromise or settlement or paying any sums of money for the settlement and compromise of this minor ward's personal injury claims as described above without first securing the approval of this court, 635-SW 2nd - 623 err. ref.

It is further ordered that inasmuch as the parties temporarily enjoined herein have been parties to these proceedings, they be given notice of this ruling and temporary injunction by the Clerk of this Court mailing by Certified Mail a Certified copy of this ruling and temporary injunction to the parties listed below. The court finds that the estate is indigent and the Clerk shall effect said service without cost.

ENTERED THIS 5th day of February, 1991 at 3:00 p.m. o'clock.

/s/ Jerome Jones
JEROME JONES,
Probate Judge
of Galveston County

Mr. C. Edgar Cloutier
Christovich & Kearney
Suite 2300
Pan American Life Center
601 Poydras St.
New Orleans, La.
70130-6078

Mr. William Nolen
Jones, tete [sic], Nolen, Hanchey,
Swift & Spears
P.O. Box 910
Lake Charles, La. 70602

Ms. Jennifer Jones Bercier
Jones, Jones & Alexander
P.O. Drawer M
Cameron, La. 70621

McLeod, Alexander,
Powel & Apffel
P.O. Box 629
Galveston, Tx. 77553

Ms. Maria deJesus
Sanchez
315 15th St., Apt. 1
Galveston, Tx. 77550

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

HECTOR SANCHEZ, SR. ET UX
VERSUS
MATTEL, INC.

CIVIL ACTION
NO. 88-1508
JUDGE WALTER

MEMORANDUM RULING AND ORDER
(Filed Jun. 21, 1991)

Pending before this court is a joint motion to remove Cause No. 53,586 on the docket of the Probate and County Court of Galveston County, Texas, entitled "Guardianship of Ricardo Sanchez, A Minor" to this Court. The motion is made pursuant to this Court's authority under the All Writs Act, 28 U.S.C. §1651(a). For reasons stated below, the motion is GRANTED.

It is with great reluctance and with the deepest concern that this Court takes the extraordinary action of removing the Guardianship proceedings from the Probate and County Court in Texas. However, in view of the exceptional circumstances surrounding this case, and the need to protect this Court's jurisdiction and the best interests of the child involved, this Court has no choice but to grant the removal.

Plaintiffs brought this action seeking damages for injuries to the minor plaintiff, Ricardo Sanchez, which resulted from an accident in which he was severely burned. The accident occurred in Louisiana; the plaintiffs were residents of and domiciled in Louisiana both at the time of the accident and at the time the action was

commenced. Plaintiff Maria deJesus Sanchez was confirmed as tutrix for her minor child, Ricardo, on February 19, 1990, in the 38th Judicial District Court for Cameron Parish, Louisiana, Judge H. Ward Fontenot presiding, and was substituted as the proper party to bring this action on his behalf on March 12, 1990.

The parties to this action reached a settlement agreement in May of 1990. A conditional order of dismissal was entered on May 5, 1990, and was recalled on January 9, 1991.

In the meantime, the plaintiff and her minor child were living in Galveston County, Texas, so that the child could receive free medical care at the Shriner's Burn Center; therefore, the parties (at the insistence of the defendants) decided to seek approval for the settlement from both the Texas and Louisiana State courts. The parties have apparently not yet sought formal approval from the Louisiana Court. The parties commenced proceedings aimed at obtaining approval from the Texas Probate Court in Galveston County, Texas, Judge Jerome Jones presiding. Although the parties petitioned the court to have Maria deJesus Sanchez recognized as guardian for her minor child, the Probate Court (apparently because Ms. Sanchez could not post bond) appointed an outside guardian[1] and a guardian *ad litem* to represent the child.

The Probate Court then refused to approve the settlement, basing its refusal on the objections of the guardian *ad litem* and on its finding that the settlement *amount* was inadequate in view of the horrendous injuries suffered by

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[1] No bond was apparently required of the Guardian.

Ricardo.[2] By order dated February 5, 1991 the probate court enjoined the parties from seeking approval for the settlement, or for any other settlement proposal, in this Court.

> . . . it is therefore ordered that Maria deJesus Sanchez and the attorney Jennifer Jones Bercier be and are hereby temporarily enjoined from entering into any settlement or compromises; [sic] signing any settlement or compromise documents, petitioning any court, other than this court, to approve any settlement or compromise of the personal injury cause of action described above without receiving prior approval of this court.
>
> It is further ordered that the defendants, Mattel, Inc., and Ogilvy & Mather, Inc., and their agents and attorneys . . . be temporarily enjoined from entering into compromise or settlement or paying any sums of money for the settlement and compromise of this minor ward's personal injury claims as described above without first securing the approval of this court.

In the same order, the Probate Court stated that it did not dispute the jurisdiction of this Court "to try the personal injury to a final judgment, *after trial to a jury.*" (emphasis supplied). In other words, the Probate Court recognized that this Court has jurisdiction of the action, but erroneously appropriated to itself *exclusive* power to approve or disapprove the settlement of a case pending before this Court; the Probate Court then issued orders

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[2] Apparently Judge Jones did not consider the risk of failure to prove liability. Judge Jones told this court that he preferred that the minor child "roll the dice" in the instant case.

which interfered with this Court's control of both this case and its own docket.

On January 14, 1991, the parties petitioned this Court to "remove cloud upon title to movable property located in this district" (the only property owned by the minor plaintiff is his cause of action pending in this Court), and this Court ordered a hearing on the motion.

An informal hearing was held on February 18, 1991 in Lake Charles, La. The plaintiff's attorney agreed to discuss the issue of the settlement further with the Texas probate court in order to avoid a conflict between the courts if possible. This Court also ordered the plaintiff's attorney to brief the issue of the relative jurisdiction of the two courts to approve the proposed settlement.[3]

Ms. Bercier, the plaintiff's attorney, complied with this Court's instruction in an informal letter to this Court citing relevant statutes and case law.

The probate judge held a meeting on Monday, January 25, 1991 at 3:00 p.m. in Galveston at the request of this Court. He stated on the record that the meeting was held strictly at this Court's request, that he would not reconsider his refusal to approve the settlement, and that Ms. Bercier might be in "technical" contempt of his court, apparently for appearing at the hearing on February 18th and for briefing this Court on the jurisdictional issue.

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[3] At the February 18, 1991 meeting, lawyers for the defendants expressed reluctance to discuss or brief the law or the facts to this Court in view of Judge Jones' orders.

On March 8th, this court issued an order scheduling a hearing to determine whether the settlement of the pending claim should be approved by this court, and enjoining the probate court and the Texas parties and their attorneys from interference with these proceedings.

On March 13, 1991, Robert Shattuck, the guardian ad litem appointed in Galveston, filed an amended application for payment of attorney's fees and expenses in which he increased the estimate of his fees and expenses from the $10,000.00 amount specified in his March 1st application to a sum "in excess of $25,000.00." This application was followed on March 22, 1991 by an ex parte order of the Probate Court, prompted by an application by the Texas guardian, Clara Cooley, which permitted her to hire two additional law firms, Jamail & Kolius, and Greer, Herz, & Adams, to represent her as guardian. A hearing was held in the Probate Court on March 28, 1991, on a motion to dissolve the February 5th injunction of the parties and their attorneys from seeking approval of the settlement before this Court. At the hearing Judge Jones announced that he had also retained counsel to appeal this Court's March 8th order to the U.S. Fifth Circuit.

On the same day, a Petition for Writ of Mandamus or Alternatively Prohibition was filed in the U.S. Fifth Circuit Court of Appeal on behalf of Judge Jones who was subsequently joined by Ms. Cooley. On April 2, 1991, the U.S. Fifth Circuit denied this petition and on April 4th a Notice of Appeal was filed by Judge Jones. The next day, April 5th, Judge Jones entered an order dissolving his injunction against the parties and their attorneys from participation in the settlement hearing ordered by this

Court "under threat of coercion" but "specifically reaffirm[ing] that . . . the parties are totally without authority to settle the minor's claim . . . without specific approval . . . " of the Galveston Probate and County Court, and "that the proposed settlement is inadequate." On the same date Clara Cooley communicated with counsel advising of the court's approval of her employment of two additional law firms and stating that she or her attorneys were the only parties with settlement authority.

These were circumstances, when this Court's settlement conference was held on April 8, 1991, in Lake Charles. At the conclusion of both open and in camera discussions with Mrs. Sanchez and her son, this Court advised that it would approve a revised settlement agreement which increased the consideration to be paid because "considering the question of liability, that this is a good settlement and in the best interest of the minor Ricky . . . . " (Transcript, p.25, l.15 et seq). However, this Court conditioned this approval "upon a resolution of the Texas probate matter" (Transcript, p.27, l. 16).

Counsel for defendants have since written on several occasions and have also attempted to telephone counsel involved in the Galveston probate proceeding seeking statements as to whether this Court's approval of the settlement would be honored and of the attorney's fees and expenses properly due. None of the Telephone calls have been returned, and the written requests brought forth only one response, detailed below.

The United States Fifth Circuit dismissed Judge Jones' appeal of this Court's March 8th injunction order on June 5, 1991. On June 11th, Mr. Shattuck wrote that he

would "be willing to accept $29,000.00 as the ad litem fee for services and expenses to date . . . . " He did not provide any substantiating documentation for the amounts alleged to be due.

As a result of the lack of response from attorneys for the Texas parties, the parties to this proceeding are unable, despite the elapse of more than 60 days since the settlement hearing, to advise this Court whether the Texas probate matter can be resolved. The trial date has had to be continued and reset for September. That is how the matter now stands.

Under the All Writs Act, 28 U.S.C. §1651(a), this Court has the authority to issue "all writs necessary or appropriate" in aid of its jurisdiction. This Act authorizes this Court, in exceptional circumstances,

> to issue such orders to persons "who, though not parties to the original action or engaged in wrong doing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice."

Yonkers Racing Corp. v. The City of Yonkers, 858 F.2d 855 (2d Cir. 1988); *cert. denied,* 489 U.S. 1077 (1989).

The circumstances surrounding this suit are extraordinary. The proceedings in the Texas court have interfered with this Court's ability to exercise control over a case which is clearly within its jurisdiction. The proceedings have held up for over a year a settlement which is in the best interests of the child involved. The specter of unknown costs and possible litigation in the Texas court

prevents the parties and this Court from making any rational decision on whether the settlement should finally be approved.

Therefore, IT IS HEREBY ORDERED that Cause No. 53,586 on the docket of the Probate and County Court of Galveston County, Texas, entitled "Guardianship of Ricardo Sanchez, a Minor," be and the same is removed to the United States District Court for the Western District of Louisiana and consolidated with this pending civil action for further proceedings.

IT IS FURTHER ORDERED that a copy of this Order be served by mail on the following persons:

Dan S. Boyd
Alan B. Rich
Johnson & Gibbs, P.C.
Founders Square
900 Jackson Street,
Dallas, Texas 75202-4499

Frank N. Inkard, Jr.
Mary E. Fullmer
100 Congress Avenue, Suite 1400
Austin, Texas 78701

ATTORNEYS FOR JUDGE JEROME JONES

Ms. Jessie Kirkendall
County Clerk
Galveston County Courthouse
Galveston, Texas 77550
(Guardianship of Ricardo Sanchez, a Minor, No. 53586)

Ms. Kathryn Cox
First Court of Appeal Clerk
3707 Jacinto Street
Houston, Texas 77002
(In Re Guardianship of Ricardo Sanchez, a Minor, No. 01-91-00222-CV)

Robert V. Shattuck, Jr.
2127 Broadway Blvd.
Post Office Drawer 2430
Galveston, Texas 77553

John S. McEldowney
Andrew J. Mytelka
Greer, Herz, & Adams
One Moody Plaza, 14th Floor
Galveston, Texas 77550

Joseph D. Jamail
Jamail and Kolius
3300 One Allen Center
Houston, Texas 77002

ATTORNEYS FOR CLARA COOLEY

THUS DONE AND SIGNED this 21st day of June, 1991.

/s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-4802

HECTOR SANCHEZ, SR., ET AL., — Plaintiffs,

versus

MATTEL, INC., and OGILVY & MATHER, — Defendants.

MARIA DE JEUSE [sic] SANCHEZ, MATTEL, INC. and OGILVY & MATHER, — Third-Party Plaintiffs-Appellees,

versus

CLARA COOLEY, — Third Party Plaintiff-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(CV88-1508)

(May 6, 1992)

Before POLITZ, Chief Judge, and WILLIAMS and DUHE, Circuit Judges.

PER CURIAM:*

Clara Cooley, a Guardian appointed for the minor Ricardo Sanchez by the Probate and County Court of Galveston County, Texas, appeals the judgment of the district court entered herein on August 19, 1991, which incorporates, *inter alia*, her removal as Guardian, the appointment of Maria de Jeuse [sic] Sanchez, mother of the minor child, as the child's guardian, the relief of counsel hired for or on behalf of Cooley as Guardian from further responsibilities, and the approval of settlement of the minor's claims for the personal injuries which are the subject of this litigation. Cooley contends that the district court erred and exceeded its jurisdiction in removing the proceedings affecting the minor from the Galveston County court, declining to remand those proceedings and for entering the foregoing rulings and ultimate judgment.

The district court acted pursuant to the All Writs Act, 28 U.S.C. § 1651(a), which empowers a federal court to "issue all writs necessary or appropriate in aid of [its] . . . jurisdiction." At all relevant times herein the district court had jurisdiction over the subject matter and persons involved in the litigation in which the appealed judgment was rendered. Cooley maintains that the federal court actions constituted a usurpation of the state court's jurisdiction. We do not agree; we find that the

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

very reverse occurred when the Probate and County Court of Galveston County enjoined the parties herein and their attorneys from proceeding with efforts to settle this federal litigation. This action by the state court was a specific and direct intrusion into the appropriate disposition of this matter by the federal district court, fully justifying its use of the authority granted by the All Writs Act.

The judgment of the district court is in all respects AFFIRMED.

Supreme Court, U.S.
FILED
SEP 4 1992
OFFICE OF THE CLERK

NO. 92-229

In the Supreme Court of the United States

OCTOBER TERM, 1992

CLARA COOLEY,
Petitioner,

V.

HECTOR SANCHEZ, SR., RICARDO SANCHEZ, MARIA DEJESUS SANCHEZ, MATTEL, INC., AND OGILVY & MATHER,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Jennifer Jones Bercier
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QUESTIONS PRESENTED

Whether the settlement reached by plaintiff and defendants (respondents herein) in the underlying suit and the judgement entered pursuant thereto renders Mrs. Cooley's appeal to the Fifth Circuit and her petition for certiorari moot.

Whether a federal district judge has the authority to approve the settlement of the claim of a minor in a suit pending in his court and over which he has jurisdiction.

Whether a federal district judge may, under the All Writs Act, remove to his court a state quardianship proceeding which has ceased to have any reason for being but which precludes conclusion of the federally approved settlement of a case pending in the federal court on behalf of a minor and which poses a threat to dissipate the proceeds of the settlement enuring to the benefit of the minor.

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No. 92-229

In The
Supreme Court of the United States
October Term, 1992

CLARA COOLEY,

Petitioner,

v.

HECTOR SANCHEZ, SR., RICARDO SANCHEZ, MARIA DEJESUS SANCHEZ, MATTEL, INC., AND OGILVY & MATHER,

Respondents.

Opposition to Petition For
Writ of Certiorari To The United States
Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The statement of the case presented by petitioner is so selective and omits so many steps in the development of the controversy before the Court as to be misleading. Accordingly, respondents present a detailed statement of the case in an attempt to clarify the specific issues presented by this controversy.

I. Summary of Facts Underlying Original Action

This controversy arises out of a tort action in which damages for personal injuries were sought on behalf of a minor, Ricardo Sanchez ("Ricky"), by his representative and mother, Maria deJesus Sanchez ("Mrs. Sanchez")[1]. Suit was initially brought against Mattel, Inc., manufacturer of a toy involved in Ricky's accident. By amended petition, Ogilvy & Mather, an advertising agency which prepared television commercials for Mattel, was added as a defendant.

Ricky was seriously burned on December 4, 1987. He claims that a few days before he had seen a television commercial prepared by Ogilvy to advertise "Hot Wheels" toy cars manufactured by Mattel. The portion of the commercial complained of was a fantasy introduction to a number of commercials in which, in a totally animanted limbo setting, molten iron is poured from a steel ladle to form a Hot Wheels car. Hot Wheels are made of metal, not plastic. In some of these commercials, the words "born in fire, formed in flames" are spoken on the sound track. The animated car then moves off into the distance. The entire introductory sequence lasts between three and four seconds.

Ricky claims he was attempting to emulate the commercial when he tried to set fire to one of his Hot Wheels cars. The match he was using, which had been given to him

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[1] Hector Sanchez, who was married to Maria Sanchez at the time the action was filed in state court, originally appeared on behalf of Ricky. However, during the proceedings, Mr. and Mrs. Sanchez were judicially separated and Ricky's custody was awarded to Mrs. Sanchez, who was qualified as his natural tutrix by the 38th Judicial District Court for Cameron Parish, Louisiana, on March 10, 1990. Mrs. Sanchez was then recognized by order of the United States District Court for the Western District of Louisiana as the proper party to pursue the action on Ricky's behalf.

by an adult aunt, ignited some grass in the vicinity, but did not produce the effect he wanted. He, therefore, obtained an almost empty gasoline can, held it over the Hot Wheels car, and shook it in an effort to get liquid out. As a result, Ricky was engulfed in a vapor cloud which was apparently ignited by the fire from the matches he had previously struck. He received serious injuries. The incident was witnessed by Ricky's 12-year old aunt, Anna, who had told him "Don't do that. It'll explode."

Following the accident, Ricky was transported to the Shriner's Burn Center in Galveston, Texas, where he has received periodic treatment since that time. The Sanchez family continued to reside in Cameron Prish, Louisiana, at the time suit was filed, and for some time thereafter.

II. Course of Proceedings

Suit was originally filed in the 38th Judicial District Court for the Parish of Cameron, State of Louisiana. Mattel removed it to the United States District Court for the Western District of Louisiana, Judge Donald E. Walter presiding. By supplemental and amending petition, Ogilvy & Mather was added as an additional defendant.

Defendants filed a motion for summary judgment asking the trial judge to dismiss the suit with prejudice. They argued and cited numerous authorities for the proposition that the claims asserted in the lawsuit were not actionable under the duty/risk analysis employed by Louisiana tort law. Defendants also demonstrated that the commercial was protected speech pursuant to the First Amendment to the United States Constitution.

Although the motion was seriously considered by Judge Walter (and caused grave concern to counsel for

plaintiffs), it was eventually denied.[2] Defendants moved for a new trial and for certain other alternative relief. This motion was also denied.

Now faced with the certainty of a trial on the merits of a case involving very serious quantum exposure and the possibility, however small, of producting "new law" which would be harmful to defendants' industries, a decision was made by defendants to try to settle the case. A third and not insubstantial factor in that decision was honest compassion by representatives of defendants for this terribly injured child, notwithstanding their firm belief that those injuries did not result from any legal or moral fault on their part. In May of 1990, a settlement was negotiated between defendants and counsel for plaintiffs on the basis of a structured settlement having a cost of $750,000.

Prior to the settlement, Mrs. Sanchez and her children, including Ricky, had moved from Cameron, Louisiana, to Galveston, Texas, in order to be near the Shriner's Burn center where Ricky continued to receive treatment.

Having agreed to pay three quarters of a million dollars in settlement of what objectively was a "no liability" case, it was inconceivable to defendants that anyone having the slightest concern for Ricky's best interests

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[2] In a subsequent settlement hearing, Judge Walter revealed his evaluation of defendants' contentions when he advised Mrs. Sanchez:

> Mrs. Sanchez, no amount of money could ever compensate for Ricky's tragic injuries. If liability were clear, certain, this would not be anywhere near enough money. The problem is that liability, in my opinion, is problematical. It may be that the law would ultimately favor you on appeal. But it's going to take a new theory or recognizable cause of action.

would fail to approve the proposed settlement.[3] Thus, there was no reason not to seek approval from every tribunal having any colorable claim to jurisdiction over the minor. Accordingly, it was decided to first seek approval of the settlement from the probate court having jurisdiction over the minor's current residence in Galveston County, Texas, then to seek approval from the 38th Judicial District Court of the State of Louisiana for the Parish of Cameron, which had qualified Mrs. Sanchez as natural tutrix of Ricky in a tutorship proceeding which remained open in that Court, and finally to obtain the approval of the federal district court in which the tort suit was pending by presentation of a final order of dismissal based upon the settlement. Defendants and Mrs. Sanchez proceeded accordingly.

Texas counsel was employed at the expense of defendants to represent Mrs. Sanchez in obtaining approval of the settlement by the appropriate Texas court, and on June 7, 1990, proceedings were instituted in the Probate and County Court of Galveston County, Texas. Problems began to develop almost from the beginning. First, the judge of the Galveston Country Probate Court to which the matter was assigned, Judge Jerome Jones, conditioned appointment of Mrs. Sanchez as guardian of her minor child on posting a bond in an amount for which she obviously could not qualify. It was suggested that under these circumstances it was customary to appoint an employee of

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[3] Judge Walter apparently shares the same view. In commenting on the possibility that his approval of the settlement would be appealed, he observed:

> It would be incomprehensible to me that anybody would reverse the approval of the settlement.

It should also be noted that Mrs. Cooley did not appeal Judge Walter's finding, in approving the settlement, that it was in Ricky's best interest.

the Texas Welfare Department to act as guardian, which was only a formality. Accordingly, Judge Jones appointed Mrs. Cooley, petitioner herein, as guardian.

Judge Jones held hearings on July 3, 1990 and October 23, 1990 to consider the settlement reached in May, 1990. However, he did not act on the application for approval of the settlement. Moreover, the focus of the October 23, 1990 hearing seemed to be, incredibly, on the effect the settlement would have on welfare benefits payable to Mrs. Sanchez's family as a unit, rather than on the very substantial amounts of money which would be paid to Ricky over his lifetime in lieu of being dependent upon welfare and charity.

On December 13, 1990, Judge Jones wrote a letter to Texas counsel representing Mrs. Sanchez, stating that the proposed settlement was not before the court, since the application for approval was filed on behalf of Mrs. Sanchez, and not by Mrs. Cooley. This position of Judge Jones indicated to respondents that the Texas proceeding had been a waste of time and that there was no point in pursuing it further. Accordingly, the original plan for obtaining multiple approvals of the settlement was abandoned and it was decided to go directly to the federal district court and ask that court to exercise its inherent power to approve settlement of a minor's tort suit pending before it.

On January 17, 1991, defendants joined Mrs. Sanchez in filing a joint petition in the federal district court setting forth the background discussed above and asking Judge Walter to approve the proposed settlement. Incorporated in that joint petition was a third-party demand by defendants against Mrs. Cooley and Robert V. Shattuck, a Galveston attorney who had been appointed attorney *ad litem* for the minor by the probate court, and an action to

quiet title by Mrs. Sanchez against Mrs. Cooley and Mr. Shattuck. Both pleadings sought to have Mrs. Cooley and Mr. Shattuck assert any positions they might have concerning the minor's claim and the settlement.

After the filing of this joint petition, Judge Jones suddenly decided that the application of Mrs. Sanchez was before him and, by order of February 5, 1991, he denied the application to settle and enjoined plaintiffs, defendants and their attorneys from entering into a settlement. An appeal from Judge Jones' injunction was taken, but was dismissed as moot on October 3, 1991 because of the events set forth below.

On February 18, 1991, the federal district court held an informal hearing on the joint petition. Following an unsuccessful effort by Judge Walter to avoid a conflict with the Texas probate court during the course of which Judge Jones advised that he preferred to allow the minor to "roll the dice," Judge Walter issued an order on March 8, 1991, ruling that he, as the federal district judge of the court in which the minor's tort suit was pending, had authority to consider and approve a settlement of the claim of the minor, and that the Texas probate court had no authority to interfere with his exercise of that jurisdiction by enjoining the parties or their attorneys. He further ordered plaintiffs and defendants to appear in his court on Monday, April 8, 1991, for a hearing to determine whether the settlement should be approved. The order further stated that the only property owned by the minor plaintiff was his interest in the lawsuit pending in federal district court and that the Texas guardians had no authority to act or deal with said property. Judge Walter then dismissed the third-party demands against the Texas guardian and stated that she need not appear at the April 8 hearing. Finally, Judge Walter enjoined the Texas probate court, Judge Jones,

Mrs. Cooley and Mr. Shattuck from interfering with the hearing scheduled for April 8, 1991.

Thereafter, Judge Jones granted Mrs. Cooley authority to employ the law firms of Jamail & Kolius of Houston, Texas, and Greer, Herz & Adams of Galveston, Texas, to represent her and the minor's estate. On April 5, 1991, Judge Jones also issued an order dissolving his earlier injunction of the parties from entering any settlement without his authority, in which he reaffirmed his position that the parties could not settle without his authority and that the proposed settlement was inadequate. Mrs. Cooley then wrote a letter to the parties stating that only she and her attorneys had authority to settle Ricky's claims.

Judge Jones also sought reversal of Judge Walter's order of March 8 by a writ application to the Fifth Circuit Court of Appeal, which was denied on April 2, 1991, and by an appeal to the Fifth Circuit, which was dismissed on June 5, 1991.

In the meantime, the hearing scheduled for April 8, 1991, was held. Judge Walter elicited detailed testimony in order to make a determination that the proposed settlement, which was actually more favorable than that initially considered by Judge Jones, was in the best interest of the minor. The monthly annuity had been increased by $500.00 per month during Ricky's minority and, at Judge Walter's suggestion, counsel for Mrs. Sanchez agreed to a substantial reduction of her fees and a waiver of expenses. Based upon his determination of the facts in the April 8, 1991 hearing, Judge Walter approved the proposed settlement. No appeal or writ application was taken from Judge Walter's approval of this settlement.

Judge Walter conditioned his April 8 approval of the settlement upon the minor's estate being protected from costs in connection with the probate proceeding in Texas. In an attempt to satisfy that condition, counsel for defendants communicated in writing on several occasions with attorneys involved in the Galveston probate proceeding, seeking a statement as to whether the federal district court's approval of the settlement would be honored and of the attorneys' fees and expenses properly due and taxable as costs. These written requests brought forth only one response. By letter of June 11, 1991, Mr. Shattuck advised that he would "be willing to accept $29,000 as the *ad litem* fee for services and expenses to date . . ." Other Galveston counsel did not respond to defendants' requests. Being thus stymied in their efforts to satisfy the condition imposed by judge Walter and faced with a Texas judge essentially advising that the settlement would be null and void and thus ignored even if approved by Judge Walter, on June 20, 1991, defendants joined with Mrs. Sanchez in filing an *ex parte* motion to remove the probate proceeding pursuant to the All Writs Act. This motion was granted by order of the court on June 21, 1991.

After motions to remand filed by Mrs. Cooley and Mr. Shattuck were denied by Judge Walter, a stipulation was entered between defendants and the Texas appointees and attorneys that the total fees for services rendered and expenses incurred through August 13, 1991, taxable as costs to the probate proceeding, were as follows:

Mrs. Clara Cooley	-	$ 1,268.25
Mr. Robert V. Shattuck, Jr.	-	13,979.91
Greer, Herz & Adams	-	-0-
Jamail & Kolius	-	-0-

The stipulation was filed at a hearing held by Judge Walter on August 13, 1991. It was explained to the court that the attorneys for Mrs. Cooley had stipulated the zero fee because their compensation was to be on a contingency basis.

At the hearing on August 13, Judge Walter entered a final judgment in which he dismissed the motions to remand, fixed the fees of the Texas appointees and their attorneys as set forth in the stipulation, and made the terms of the settlement agreement which had been approved at the April 8, 1991 hearing, the judgment of the court. The judgment also suspended all payments called for thereunder pending any appeal of the judgment, except for the sum of $35,730 which was to be paid immediately in order to take care of the needs of the minor during any appeal. Mrs. Cooley (petitioner herein) then took an appeal to the Fifth Circuit complaining only of the removal of the guardianship proceeding and making no complaint concerning the approval of the settlement by Judge Walter.

The panel of the Fifth Circuit which heard the arguments on the appeal on May 5, 1992, were as incensed as respondents herein at the actions of Judge Jerome Jones of the Texas Probate Court and the defense thereof made by Mrs. Cooley and the attorney she employed on a contingency fee contract pursuant to Judge Jones' specific authorization. In less than twenty-four hours after hearing the arguments, the Fifth Circuit sustained the judgment of the federal district court in all respects, stating that the "action by the state court was a specific and direct intrusion into the appropriate disposition of this matter by the federal district court, fully justifying its use of the authori-

ty granted by the All Writs Act."[4] Petitioner now seeks writs from the Fifth Circuit's affirmation of the federal district court's actions.

SUMMARY OF ARGUMENT

Approval by U. S. District Court Judge Walter of the settlement of the underlying tort suit reached between defendants and the minor, duly represented by his mother, renders this petition for writ of certiorari moot. The *res judicata* effects of the consent judgment approving the settlement, which has not been appealed, precludes relitigation of those issues intended to be fully resolved, liability and damages. Accoridingly, the issues raised in petitioner's writ of certiorari are moot and of academic interest only.

Moreover, removal of the Texas probate proceeding pursuant to the All Writs Act is supported by the extraordinary circumstances which existed and jurisprudence interpreting that Act. The federal district court, having approved settlement of the minor's claim pending before it as a fair and equitable resolution of a questionable cause of action, was genuinely concerned with the distinct possibility of the settlement funds being drained away by court costs in the Texas probate proceedings. Additionally, by refusing to cooperate with the federal district court and respondents in their attempts to bring this matter to a conclusion, and insisting that the federal district court had no authority to approve the settlement, those involved in the

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[4] The Fifth Circuit did not even perceive the issue to be a close one, refusing to publish its opinion, per Local Rule 47.5, which provides:

> The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession.

probate proceeding were interfering with the federal district court's exercise of its diversity jurisdiction and authority to approve the settlement, necessitating removal of the Texas proceedings under the All Writs Act. The Fifth Circuit Court of Appeals' affirmation of the district court's actions was eminently appropriate and the petition for writ of certiorari should be denied.

Petitioner misinterprets and/or misapplies the law. The "probate exception" to federal jurisdiction is inapplicable to the approval of a minor's settlement by a federal court. Even if the exception were applicable, the district court had diversity jurisdiction over the tort action and thus the independent authority to act in the minor's best interests as well as to protect its jurisdiction pursuant to the All Writs Act.

Alternative arguments raised by petitioner, that the All Writs Act cannot be used to usurp a state official's power, and that a case on appeal cannot be removed, are also without merit. The cases cited in support of the first argument involve the invocation of federal jurisdiction *solely* to compel state officers to act in a ceratain way. The cases cited in support of the second argument are inapplicable because removal in those cases was pursuant to the removal statutes, not the All Writs Act, as in the present case.

Petitioner's suggestion of an alternative solution to the removal, jury trial of the underlying matter, is not a "viable, alternative remedy," as a likely result if the case were tried would be a verdict in favor of defendants. Her arguments objecting to the lack of adherence to proper procedural requirements of the removal statutes are equally without merit. The Texas probate proceeding was removed pursuant to the All Writs Act, whose procedural re-

quirements are different than the requirements of the removal statutes.

REASONS FOR DENYING WRIT OF CERTIORARI

The District Court decision as affirmed by the United States Court of Appeals for the Fifth Circuit does not raise issues of a character which fulfill the requirements of Rule 10, Rules of the Supreme Court of the United States. As noted by the Fifth Circuit, the issues raised by petitioner were decided in respondents' favor on the basis of well-settled principles of law.

I. Respondents Urge Denial of Certiorari on the Ground that Approval by the District Court Judge of the Settlement Renders Petitioner's Writ of Certiorari Moot and of Academic Interest Only

Mrs. Cooley's argument that the probate proceeding was improvidently removed is premised on the erroneous assumption and inference that the federal district court was without independent jurisdiction or authority to approve the settlement of Ricky's claim. Because the district court had jurisdiction and authority to recognize Mrs. Sanchez as Ricky's representative, and to approve the settlement agreement, the binding, preclusive effect of the consent judgment renders moot the collateral issues of the correctness of the district court action in removing and refusing to remand the Texas probate proceedings and removing appellant as guardian of the minor.

The district court had authority, pursuant to FRCP 17(c), to recognize or appoint Mrs. Sanchez as Ricky's

representative in the case pending before it.[5] Rule 17(c) also gives the district court authority to "make such other order as it deems proper for the protection of the infant or incompetent person." The authority to recognize or appoint a representative, thus, also encompasses the authority to authorize and approve actions by the representative, including settlements. *See Insurance Co. v. Bangs,* 103 U.S. 435, 13 Otto 435, 26 L.Ed. 580 (1880); *Thompson v. Maxwell Land-Grant and Railway Co.,* 168 U.S. 451, 18 S.Ct. 121, 42 L.Ed. 539 (1897); *Decanay v. Mendoza,* 573 F.2d 1075 (9th Cir. 1978); *Glover v. Bradley,* 233 F. 721 (4th Cir. 1916); *Carter Coal Co. v. Litz,* 54 F.Supp. 115 (W.D. Va. 1943), *aff'd,* 140 F.2d 934 (4th Cir. 1944).

In summary, a federal district court which is authorized and compelled to look after the interests of minor plaintiffs before it also has the power and authority to approve settlements entered into on behalf of those minors. To hold otherwise, as suggested by petitioner, would result in the necessity of trying every case involving a minor, a consequence antithetical to the recognized precept that settlements are a favored way of resolving legal disputes. *Bergh v. Department of Transportation,* 794 F.2d 1575, 1577 (Fed. Cir.), *cert. denied,* 479 U.S. 950, 107 S.Ct. 437, 93 L.Ed. 2d 386 (1986). At the hearing held on April 8, 1991, Judge Walter fulfilled all of the procedural rquirements to ensure that Ricky's interests were pro-

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[5] (c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian *ad litem.* The court shall appoint a guardian *ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person. FRCP Rule 17(c).

tected and the settlement was fair by making independent inquiry into the question of whether the proposed settlement was in the best interest of the minor. The approved settlement which was made the judgment of the federal district court, precludes any further litigation concerning defendants' liability to Mrs. Sanchez, and their minor son, Ricky. Therefore, this Court should deny Mrs. Cooley's petition as being moot.

II. The District Court Properly Removed the Texas Probate Proceeding Pursuant to the All Writs Act and the Fifth Circuit Properly Affirmed

Petitioner's argument objecting to the removal of the Texas probate proceeding erroneously assumes that there were not and could not be procedings in the federal district court to approve the settlement negotiated between plaintiffs and defendants until the Texas probate proceeding was removed in July of 1991, and that Judge Walter's approval of the settlement was "in" the probate proceeding. This error is reflected by the gaping omissions in Mrs. Cooley's outline of the proceedings below. Mrs. Cooley's argument also incorrectly suggests that the settlement could only be approved by the Texas probate court and the federal district court had no authority to approve the settlement.

The removal, which is all Mrs. Cooley really complains of, came months after the federal district court approved the settlement, and was prompted by the failure of Mrs. Cooley and her attorneys to cooperate with defendants in satisfying the condition imposed by Judge Walter. In view of the history of the Texas probate proceedings between June 1990 and June 1991, Judge Walter was legitimately concerned that, although the settlement was manifestly in the best interests of the minor, it might not

be concluded or the proceeds thereof might be hemorrhaged away in the Texas probate proceedings, considering the course that the Texas probate judge, his appointees and their attorneys seemed to be head-set on pursuing. As shown by their actions subsequent to removal in stipulating and paying the fees and expenses of the Texas appointees, defendants have at all time been more than willing to pay the fair expenses incurred in the probate proceedings and to do what was necessary in order to conclude it.

Mrs. Cooley has acknowledged that the only purpose of the Texas probate proceeding was to obtain approval of the settlement entered on Ricky's behalf. Because that approval was validly obtained from the federal district court on April 8, 1991, there was no longer any reason for the continued existence of the Texas probate proceeding. By refusing to cooperate with defendants in their effort to conclude the probate proceedings, Mrs. Cooley and her attorneys were interfering with the federal district court's exercise of its jurisdiction.

There is no clearer example of a situation calling for use of the All Writs Act. In the extraordinary circumstances facing the parties and the federal district court, Judge Walter clearly had the authority to remove the Galveston probate proceedings to his jurisdiction so that this litigation could be concluded. The All Writs Act, 28 U.S.C. § 1651(a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

This Act

> authorizes a Federal Court in exceptional circumstances to issue such orders to persons "who, though not parties to the original action or engaged in wrong doing, are *in a position to frustrate* the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice."

Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077, 109 S.Ct. 1527, 103 L.Ed.2d 833 (1989), quoting *United States v. New York Telephone Co.*, 434 U.S. 159, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977) (Emphasis supplied by *Yonkers* court).

In the *Yonkers* case, the Second Circuit Court of Appeals held that the following underlying circumstances supported removal of a state court proceeding to federal district court: (1) traditional statutory removal procedures were inadequate, (2) there was a need to vindicate constitutional rights, and (3) a possibility existed that inconsistent orders would be entered by the state and federal courts. These circumstances justified exercise of

> the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise attained.

Yonkers Racing Corp. v. City of Yonkers, 858 F.2d at 863.

The circumstances in the instant case were equally as exceptional as those which existed in *Yonkers*.

Statutory removal procedures were not available because there was no defendant in the Galveston guardianship proceeding and the statute would not permit removal to the federal district court in which the underlying tort action was pending. *See* 28 U.S.C. § 1441(a). Secondly, although there was no constitutional right at issue, there were equally compelling considerations. Among them were the best interests of the minor over whose claim the federal district court had properly obtained jurisdiction and the finding of that court that those interests were best served by the settlement agreement which had been reached. That protection of settlement negotiations and agreements with respect to federal suits is a proper consideration is established by the case *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985).

A final extraordinary circumstance was the distinct probability, as evidenced by prior action or inaction in the Galveston probate proceeding, that orders inconsistent with the federal district court's finding with respect to the settlement agreement would be issued if the parties were to make any attempt to proceed further in that forum. This probability is an extraordinary circumstance which is sufficient in itself to justify an All Writs order. *United States v. International Brotherhood of Teamsters*, 907 F.2d 277 (2d Cir. 1990).

Petitioner attempts to distinguish *Yonkers* by arguing that in *Yonkers*, the All Writs Act was implemented only after the federal district court issued an order which would be frustrated by the state court action. However, rather than drawing a distinction between *Yonkers* and the present case, petitioner merely magnifies the need for the federal district court's actions in the present case pursuant to the All Writs Act. Indeed, the previous actions of the Texas probate court indicated that the federal district

court's authority to approve the settlement, which it had already done in principle, would be frustrated by the Texas court's insistence that it was the only court that could approve the settlement and by all indications would refuse to honor any settlement approved by the federal district court. The timing of the actual order approving this settlement is immaterial because the action taken by the federal court pursuant to the All Writs Act was clearly necessary in aid of its jurisdiction and agreeable to the usages and principles of law.

In summary, extraordinary circumstances existed in this matter. The interests involved — those of the minor and the federal district court's finding in that regard — were substantial, could not be vindicated, and in fact were being frustrated by action or inaction in connection with the Galveston probate proceeding. That action or inaction had prevented the parties from effectuating the settlement agreement for over a year and continues even to the present — twenty seven months after the settlement was reached. An additional interest to be considered was that of judicial economy which was not being served when findings of the federal district court in the exercise of its proper jurisdiction could not be carried out either because of stubborn adherence to a contrary opinion by those involved in the Galveston probate proceedings or a refusal on their part to cooperate in effectuating the federal district court's findings.

Once the probate proceeding was removed, the problem raised by possible court costs was settled by stipulation, and all stipulated taxable costs have been paid by defendants pursuant to Judge Walter's order. The impediments having been removed, Judge Walter was then able to incorporate the terms of the settlement which he had approved under his inherent power long before the

removal into the final judgment of August 15, 1991.

It is unfortunate that the federal district court eventually had to resort to the All Writs Act in order to prevent the continued interference with its jurisdiction, but that is something of which Mrs. Cooley cannot complain since it is she and her attorneys who forced that action by their obstinacy.

III. Response to Issues Raised by Petitioner

A. The "probate exception" to a federal court's jurisdiction is not applicable in this case and, even if it were, the federal court already had diversity jurisdiction over the tort suit and its jurisdiction over the Texas probate proceeding is ancillary pursuant to the All Writs Act.

Petitioner asserts that federal courts have no jurisdiction over state probate procedings and cannot seize or control the property in a probate court's possession.[6] In addition to the fact that Ricky's property — his tort claim — was never in the possession of the probate court, the statement that federal courts have no probate jurisdiction is much too broad. 18 Wright, Miller & Cooper, *Federal Procedure and Practice: Jurisdiction*, § 3610, p. 481-82. The "probate exception" to the federal courts' general jurisdiction, which as a judicial creation must be narrowly construed, *Georges v. Glick*, 856 F.2d 971 (7th Cir. 1988),

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[6] Interestingly, in *Ankenbrandt v. Richards*, 117 S.Ct. 2206, 119 L.Ed. 2d 468, 60 U.S.L.W. 4532 (1992), this court concluded that the so called "domestic relations exception" to a federal court's jurisdiction, which is similar to the probate exception espoused by petitioner, is only applicable to "cases involving the issuance of a divorce. alimony, or child custody decree." 112 S.Ct. at 2215. The probate exception should likewise be narrowly construed only to include the probate of a will or administration of a decedent's estate.

generally refers to the probate of a will or the administration of an estate. 18 Wright, Miller & Cooper, § 3610, and cases cited therein.

The case law supports respondents' position that this "probate exception" is applicable only to the probate of a will or administration of a decedent's estate, and not to other matters within "probate" jurisdiction. For instance, in *Ashton v. Josephine Bay & C. Michael Paul Foundation*, 918 F.2d 1065, 1072 (2d Cir. 1990), the court noted that the "probate exception does not prevent a federal court from adjudicating the rights to property in an estate." In addition, in *Georges, supra*, the court held that the probate exception does not prohibit an action for legal malpractice, breach of contract, breach of fiduciary duty, and interference with trust inheritance against an attorney who prepared an amendment to a trust. The probate exception was held inapplicable because the case did not involve the actual probate of a will or directly affect the probate *res*. Thus, petitioner is simply incorrect in arguing that the "probate exception" mandates that only a state probate court has authority to approve a minor's settlement as a federal district court clearly has this authority.

However, assuming for argument that Mrs. Cooley is correct that the district court has no general jurisidiction over the "probate" proceeding, this alone does not prohibit the district court's assumption of ancillary jurisdiction pursuant to the All Writs Act. Although it is correct that the All Writs Act cannot be used to invoke jurisdiction, it can be used to protect jurisdiction previously acquired on an independent ground. *Brittingham v. United States Commissioner of Internal Revenue*, 451 F.2d 315, 317 (5th Cir. 1971). In the present case, the district court clearly had diversity jurisdiction over the Sanchez lawsuit, a fact which is not disputed or contested by petitioner. The All

Writs Act was used not to impermissibly usurp the power of the Texas probate court, as suggested by Mrs. Cooley, but rather to protect a federal court's own jurisdiction and authority to approve the settlement of a case before it — authority the probate court was attempting to usurp.

B. Petitioner is in error in asserting that the All Writs removal was an attempt to usurp a state official's discretion.

Petitioner next argues that the All Writs Act does not give federal courts authority to usurp a state official's discretion. However, the cases cited by appellant in support of this argument, *Russell v. Knight*, 488 F.2d 96 (5th Cir. 1973), and *United States ex rel. Chapman v. Supreme Court of Pennsylvania*, 151 F.Supp. 681 (W.D.Pa. 1957), are inapplicable. In these cases, as pointed out by petitioner, the respective courts held only that a federal court cannot use a *writ of mandamus* to compel a state officer to act in a certain way. In both cases, the jurisdiction of the federal court was invoked solely to attempt to have the state officers act in a certain way. In the present case, on the other hand, the All Writs removal did not compel Judge Jones to act in a certain way, but merely precluded him from acting in a way that would interfere with the federal court's jurisdiction over a case that was properly before it.

C. The All Writs Act does not prohibit removing a state court proceeding in which an appeal is pending.

Petitioner next states that a federal court has no jurisdictioin to remove a case in which an appeal is pending. However, in the cases cited, *Lowe v. Williams*, 94 U.S. 650, 4 Otto 650, 24 L.Ed. 216 (1876); *Stephenson v. Williams*, 86 U.S. 572, 19 Wall 572, 22 L.Ed. 162 (1873);

and *Katz v. Herschel Manufacturing Co.*, 150 F. 684 (C.C.Neb. 1906), removal was attempted pursuant to a removal statute, not the All Writs Act. In fact, the removal statute in the cited cases stated specifically that the application for removal must be made "before the final hearing or trial of this suit." *Lowe*, 94 U.S. at 651; *Stephenson*, 86 U.S. at 574; *Katz*, 150 F. at 685. The distinction between those cases and the present is obvious; a party to an action lodged in state court at some point will waive whatever right he has under statute to remove the action to federal court if he does not timely do so. Removal pursuant to the All Writs Act, on the other hand, is not so much concerned with the rights of the parties as with protecting the jurisdiction of the court. To place an artificial time barrier on the federal court, as sugested by Mrs. Cooley, would render the All Writs Act useless and subject a federal district court at least to the whims of a state appellate court. Further, Mrs. Cooley cites no authority to support her argument that a case on appeal cannot be removed pursuant to the All Writs Act.

D. The alternative remedy suggested by Mrs. Cooley, to allow the minor to "roll the dice" in lieu of the settlement, is clearly not a viable or favorable remedy.

Petitioner argues that the All Writs removal was erroneous because the parties had an alternative remedy to resolve the tort case. Specifically, she suggests that the federal district court should have adhered to the wishes of the Texas probate judge and tried the case by jury. Underlying this argument is petitioner's acknowledgment that the Texas probate court would be bound by the result if the case were tried. Equally true, but ignored by petitioner, is that the Texas probate court, and any other court for that matter, is also bound by the compromise settle-

ment, as discussed previously. Having agreed that the settlement is fair to all parties involved, Judge Walter properly invoked the All Writs Act to protect his authority and jurisdiction and ensure that the Texas probate court would not interfere with disbursement of the settlement funds and conclusion of the pending case. Additionally, to "roll the dice" and try the case, as suggested by Judge Jones and Mrs. Cooley, is clearly not a viable or favorable alternative remedy when the interests of a minor are involved.

Mrs. Cooley also argues that the appellees have impermissibly sought to have Judge Walter substitute his judgment for Judge Jones' judgment relative to the fairness of the settlement. This argument suggests that Judge Walter had no jurisdiction to approve the settlement, a suggestion previously established to be without merit. In addition, and more importantly, it would seem that Judge Walter, who as trial judge was familiar with both the underlying facts giving rise to this action and Louisiana law which would be applied to the case, would be in the best position to determine whether the settlement was fair and in Ricky's best interest.

E. Mrs. Cooley's argument that the removal was improper because the parties did not comply with the federal removal statutes and had no standing to seek removal is erroneous because the removal was pursuant to the All Writs Act.

Appellant argues that in removing the Texas probate court proceeding, appellees failed to comply with the requirements of 28 U.S.C. § 1441,[7] the removal statute. This

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[7] Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending....28 U.S.C. §1441(a).

argument is clearly without merit as the Texas action was not removed by the defendants pursuant to the removal statute, but by the federal district court pursuant to the All Writs Act. Such a removal has been approved in *Yonkers, supra,* and *Nowling v. Aero Services International, Inc.,* 734 F.Supp. 733 (E.D.La. 1990). Contrary to the requirements to be followed in removing a case pursuant to 28 U.S.C. § 1441, due process reqirements are fulfilled under the All Writs Act if the affected parties have actual notice and opportunity to seek relief in district court. *In re Baldwin-United Corporation,* 770 F.2d 328, 340 (2nd Cir. 1985); *United States v. Hall,* 472 F.2d 261, 266-67 (5th Cir. 1972). Petitioner does not argue that she did not receive notice of the removal nor the opportunity to seek relief in district court. In fact, she sought a remand. Nor can she argue that Judge Walter, as a federal district court judge sitting in Louisiana, cannot remove a case pending in another state pursuant to the All Writs Act as the power of a district court pursuant to the All Writs Act extends beyond a state's territorial limits. *Carbo v. United States,* 277 F.2d 433 (9th Cir. 1960), *aff'd,* 364 U.S. 611, 81 S.Ct. 338, 5 L.Ed. 2d 329 (1961).

Petitioner attempts to distinguish the present case from the *Yonkers* case. Specifically, appellant argues that in *Yonkers,* the City had standing under the removal statutes to remove and that *Yonkers* does not indicate that the All Writs Act takes priority over the procedural requirements of federal removal statutes. However, this is clearly a misstatement of *Yonkers,* inasmuch as the "inadequacy" of the removal statute was one of the extraordinary circumstances which justified resort to the All Writs Act. In *Yonkers,* as in the present case, the state court actions were removed to the federal district court pursuant to authority granted by the All Writs Act, not pursuant to the removal statutes.

Appellant's next assertion, that the All Writs Act does not circumvent the procedural requirements of the removal statutes, is equally without basis. Appellant cites no jurisprudence for this statement, and, to the contrary, the jurisprudence clearly indicates that removal pursuant to the removal statute and removal pursuant to the All Writs Act are completely different procedural devices.

CONCLUSION

Respondents submit that the issues raised by petitioner are moot and the petition should be dismissed for that reason.

Moreover, respondents submit the district court did not err in removing the Texas quardianship proceedings under the All Writs Act and the Fifth Circuit properly affirmed. Uncontested diversity jurisdiction over the tort claim of a minor empowered the court to appoint the minor's natural mother as his federal representative and to authorize and approve her settlement of her son's claims based upon an uncontested finding that the $750,000.00 settlement, which makes lifetime benefits available to the minor, was in his best interests. Consequently, the action or inaction of the state probate court and its appointees, which precluded conclusion of the settlement, presented extraordinary circumstances which justified resort by the federal district court to All Writs power. Its exercise of that power to remove the impediment to its jurisdiction was proper and the Fifth Circuit properly affirmed this use of the All Writs Act based on the circumstances caused by the Texas Probate Court and its subjects. The petition for writ of certiorari is totally without merit and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon all counsel of record by depositing same in the United States Mail, postage prepaid, this 4th day of September, 1992, at New Orleans, Louisiana.

C. Edgar Cloutier

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